

# Exhibit 2

No. 01-23-00362-CV

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IN THE COURT OF APPEALS  
FOR THE FIRST DISTRICT OF TEXAS  
HOUSTON, TEXAS

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Candace Louise Curtis v. Carl Henry Brunsting, Individually and as  
Independent

Executor of the Estates of Elmer H. Brunsting and Nelva E. Brunsting

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Original Proceeding from Harris County Probate Court No. 4

Cause No. 412,249-401

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APPELLANTS BRIEF ON APPELLATE COURT JURISDICTION

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**TRIAL JUDGE**

The Honorable James Horwitz  
Presiding Judge, Harris County Probate Court No. 4

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To the Honorable Justices,

Appellant has received the Court's Notice of Intent to Dismiss for want of appellate court jurisdiction and providing Appellant fourteen days in which to provide the court with a brief demonstrating that the court does have appellate jurisdiction in this matter.

### **Latches and Limitations**

As this Court noted, this appeal was filed after expiration of the limitations period prescribed by the Texas Rules of Appellate Procedure. While this would give the a priori appearance of a want of appellate court jurisdiction, the question of appellate court jurisdiction actually turns on the nature of the judgement challenged and whether the judgement is void or merely voidable.

A judgment is void only when it is apparent that the court rendering judgment "had no jurisdiction of the parties, no jurisdiction of the subject matter, no jurisdiction to enter the judgment, or no capacity to act as a court." *Browning v. Placke*, [698 S.W.2d 362, 363](#) (Tex. 1985). Errors other than lack of jurisdiction render the judgment merely voidable and must be attacked within prescribed time limits. *Cook v. Cameron*, 733 S.W.2d 137, 140 (Tex. 1987), *Bayoud v. Bayoud* 797 S.W.2d 304 (Tex. App. 1990)

Voidable orders are readily appealable and must be attacked directly, but void orders may be circumvented by collateral attack or remedied by mandamus. *Mapco, Inc. v. Forrest*, 795 S.W.2d 700, 703 (Tex. 1990) (original proceeding); *Sanchez v. Hester*, 911 S.W.2d 173, 176 (Tex. App.-Corpus Christi 1995, orig. proceeding). A judgment is void if it is apparent that the court rendering the judgment had no jurisdiction of the parties, no jurisdiction of the subject matter, no jurisdiction to render the judgment, or no capacity to act as a court. *Mapco*, 795 S.W.2d at 703. All errors other than jurisdictional deficiencies render the judgment merely voidable, and such errors must be corrected on direct attack. *Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985). *Gutman v. De Giulio*, No. 05-20-00735-CV, at \*8 (Tex. App. Feb. 25, 2022)<sup>1</sup>

### **This Court Does have Appellate Jurisdiction**

*“While it is wholly unnecessary to appeal from a void judgment, it is nevertheless settled that an appeal may be taken and the appellate court in such a proceeding may declare the judgment void. *Fulton v. Finch*, 162 Tex. 351, 346*

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<sup>1</sup> In re Ocegueda 304 S.W.3d 576 (Tex. App. 2010) This same conclusion was reached by the court citing to *Browning v. Placke* and *Cook v. Cameron*



.S.W.2d 823, 827 (1961).<sup>2</sup> ” Ramsey v. Morris, 578 S.W.2d 809 (Tex. Civ. App. 1979) State ex Rel. Latty v. Owens, 907 S.W.2d 484, 486 (Tex. 1995)

*“A court's precision in discussing the judgment as void or voidable is important in order to avoid engendering confusion when the distinction is material. Thus, regardless of when the challenge is asserted, if a party challenges a judgment as void, the first inquiry should necessarily be whether the alleged defect renders the judgment void or merely voidable.”*

*A direct attack—such as an appeal, a motion for new trial, or a bill of review—attempts to correct, amend, modify or vacate a judgment and must be brought within a definite time period after the judgment's rendition. A void judgment, on the other hand, can be collaterally attacked at any time. PNS Stores, Inc. v. Rivera ex rel. Rivera, 379 S.W.3d 267, 272 n.8 (Tex. 2012)*

*It is well settled that a litigant may attack a void judgment directly or collaterally, but a voidable judgment may only be attacked directly. Hagen v. Hagen 282 S.W.3d 899, 902 (Tex.2009) “Where a court rendering judgment does not have jurisdiction, the judgment is void and cannot operate as res judicata; it neither binds, bars, nor Estops anyone.” 34 Tex.Jur.2d, Sec. 467, page 514. Kohls*

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<sup>2</sup> *Fulton v. Finch* was superseded by statute on other ground by *In re Baylor Medical Center*, 280 S.W.3d 227 (Tex. 2008)

v. Kohls 461 S.W.2d 455 (Tex. Civ. App. 1970)

*“The law is well settled that a void judgment is a nullity that may be attacked at any time.”* (citation omitted); Restatement (Second) of Judgments § 65 cmt. b.” Mitchell v. MAP Res., 649 S.W.3d 180, 196 n.15 (Tex. 2022). *“A formal judgment rendered by a court without jurisdiction of the subject-matter is void, and may be attacked at any time in any manner.”* ” Rone v. Marti, 244 S.W. 639, 640 (Tex. Civ. App. 1922).

### **The Supplemental Record**

Because Carl’s 412249-401 action was filed as ancillary to the Estate of Nelva Brunsting No. 412249, it is necessary to examine the record in the base case. Rather than ask the Court to take judicial notice of certified copies of the relevant records from the base cases previously filed with the Appeals Court by Petition for Writ of Mandamus No. 01-22-00514-cv on July 11, 2022, Appellant has asked the clerk to supplement the record with those self-same relevant records.

The record will show that the Decedents, Elmer H. and Nelva E. Brunsting, both had pour-over wills with a family living trust as the sole devisee and that both wills called for independent administration. The record will show that letters

testamentary for independent administration were issued August 28, 2012; the inventory, appraisal, and list of claims had been filed by the independent executor March 27, 2013 and approved by the probate court April 5, 2013 and that Carl Henry Brunsting filing his civil tort suit in the statutory probate court April 9, 2013. The law on independent administration is clear. After the inventory has been approved further action of any nature may not be had in the probate court except where Title II of the Estates Code specifically and explicitly provides for some action in the probate court. Tex. Est. Code § 402.001

*When an independent administration has been created, and the order appointing an independent executor has been entered by the probate court, and the inventory, appraisal, and list of claims has been filed by the independent executor and approved by the court or an affidavit in lieu of the inventory, appraisal, and list of claims has been filed by the independent executor, as long as the estate is represented by an independent executor, further action of any nature may not be had in the probate court except where this title specifically and explicitly provides for some action in the court.*

### **The Complete Absence of Subject Matter jurisdiction**

The Action filed by Carl Henry Brunsting, Individually and as Independent Executor of the Estates of Elmer H. Brunsting and Nelva E. Brunsting on April 9, 2013 was filed five days after the inventory had been approved. The action was brought under the Texas Civil Practices and Remedies Code as ancillary to a

closed probate and not only fails to cite to the specific and explicit provision in the estates code that specifically and explicitly authorized his action; he fails to even mention the estates code.

The judgment in cause No. 412249-401 is void ab initio for want of subject matter jurisdiction and with the judgment being void the rule of Res judicata cannot apply. 26 Tex.Jur. Sec. 72, page 382 and authorities cited therein. 50 C.J.S., Judgments, § 617, p. 38; 50 C.J.S. Judgments, § 703, p. 158.

### **In Summary**

The statutory probate court was never capable of composing a court of competent jurisdiction over the subject matter of Independent Executor Carl Brunsting's non-probate related 412249-401 action and consequently, all of the orders and judgments entered in the case are void ab initio for want of subject matter jurisdiction and this Court does have appellate jurisdiction .

Independent Executor Carl Henry Brunsting was foreclosed by will and by statute from filing any further action in the probate court and not being an heir to any pending estate he had no individual standing to file any action in the probate court. It's really that simple. The claims filed by the Independent Executor after the

independent administration had closed, failed to invoke the jurisdiction of the statutory probate court as a matter of law and the subsequent judgments and orders were entered in the complete absence of subject matter jurisdiction and are void ab initio. The only jurisdiction Harris County Statutory Probate Court No. 4 ever acquired over the 412249-401 matter at the time the independent executor filed his nonprobate tort action, was to dismiss for want of subject matter jurisdiction.

*Where a court rendering judgment does not have jurisdiction, the judgment is void and cannot operate as res judicata; it neither binds, bars, nor Estops anyone. 34 Tex.Jur.2d, Sec. 467, page 514. Dews v. Floyd 413 S.W.2d 800 (Tex. Civ. App. 1967) Kohls v. Kohls 461 S.W.2d 455 (Tex. Civ. App. 1970).*

Voidable judgments are subject to laches and limitations while void judgments are barred by neither. "A judgment void upon its face is subject to an attack at any time, regardless of the statute of limitation." Newsom v. State 236 S.W. 228 (Tex. Civ. App. 1922).

Appellate courts do not have jurisdiction to address the merits of appeals from void orders or judgments; rather, they have jurisdiction only to determine that the order or judgment underlying the appeal is void and make appropriate orders based on that determination. *See State ex rel. Latty v. Owens*, [907 S.W.2d 484, 486](#) (Tex.1995); *see also Univ. of Tex. Sw. Med. Ctr. of Dallas v. Margulis*, [11 S.W.3d](#)

[186, 187](#) (Tex.2000) (per curiam) *Freedom Commc'ns, Inc. v. Coronado*, 372 S.W.3d 621, 623 (Tex. 2012).

## **Conclusion**

*'Although a void judgment may be attacked directly, as well as collaterally, there is no necessity for doing so; it need not be vacated or set aside; it may be simply ignored. And when some right is asserted under the judgment, its invalidity may be pointed out by anyone in any kind of proceeding, in any court, and at any time.'* 34 Tex.Jur.2d, § 260, p. 170, and cases cited. *Boyd v. Gillman Film Corp.* 447 S.W.2d 759 (Tex. Civ. App. 1969).

Appellant in this proceeding claims the right to have the complete absence of subject matter jurisdiction in the 412,249-401 action, and all probate court proceedings had thereunder, declared void ab initio for want of subject matter jurisdiction in this court, in this proceeding at this time and neither doctrines of latches nor statutes of limitations apply to judgments void for want of subject matter jurisdiction. There is no bar to this court granting the relief requested.

Respectfully submitted

**CERTIFICATE OF SERVICE**

I, Candice Schwager, hereby certify that the foregoing document, along with the Clerk and Reporters records, were served on all counsel of record through the state electronic filing system and via email on the \_\_\_\_\_ day of October 2023

**CERTIFICATE OF COMPLIANCE**

I, Candice Schwager, hereby certify that this document was generated by a computer using Microsoft Word which indicates that the total word count of this document is 8,022 words and that the countable content is 6,857 words, including footnotes, and is thus in compliance with TEX. R. APP. P. 9.4(i)(2)(B).

Respectfully submitted,